

***United States Court of Appeals
for the Second Circuit***



APPENDIX

DOCKET No.

74-1033

TO BE ARGUED BY:

ANTONIO C. MARTINEZ

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GUSTAVO ADOLFO MONTES-ROMO and
DORA OCHOA-HUNT DE MONTES,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE

(by its District Director at New York, N.Y.)

Respondent.

APPENDIX TO PETITIONERS' BRIEF

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PAGINATION AS IN ORIGINAL COPY

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ORDER TO SHOW CAUSE AND NOTICE OF HEARING
BEFORE THE IMMIGRATION JUDGE, DATED 3/26/73.

To: MONTES-ROMO, GUSTAVO ADOLFO

File No. A20 093 987

323 50th Street, Brooklyn, New York

Address (number, street, city, state, and ZIP code)

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of ECUADOR
and a citizen of ECUADOR
3. You entered the United States at New York, N.Y.
on or about FEBRUARY 1, 1969
(date)
4. At that time you were admitted as a nonimmigrant visitor for pleasure and were authorized to remain in the United States until AUGUST 1, 1969
5. You remained in the United States thereafter without authority.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a) (2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Sec. 101(a) (15) of said act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 20 W Broadway, New York, NY 14th Fl. on April 12, 1973 (M) at 8:45 AM, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Date: March 26, 1973

IMMIGRATION AND NATURALIZATION SERVICE

ORDER TO SHOW CAUSE AND NOTICE OF HEARING
BEFORE THE IMMIGRATION JUDGE, DATED 3/26/73

To OCHOA-HUNT DE MONTES, DORA File No. A20 093 988
(name)

323 50th Street, Brooklyn, New York
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of ECUADOR
and a citizen of ECUADOR
3. You entered the United States at NEW YORK, N.Y.
on or about JANUARY 26, 1972
(date)
4. At that time you were admitted as a nonimmigrant visitor for pleasure and were authorized to remain in the United States until FEBRUARY 10, 1972
5. You remained in the United States thereafter without authority.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a) (2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Sec. 101(a) of said act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 20 W Broadway, New York, NY 14 Fl. on APRIL 12, 1973 (M) at 8:45 AM, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Date: March 26, 1973

IMMIGRATION AND NATURALIZATION SERVICE

TRANSCRIPT OF DEPORTATION HEARING HELD ON APRIL 12, 1973
BEFORE THE IMMIGRATION JUDGE FROM PAGE 2, LINE 17 TO PAGE
4, LINE 13 INCLUSIVE.

IMMIGRATION JUDGE TO RESPONDENTS:

Q You have a child born in United States?

A Yes (by mother).

Q When was the child born?

A On January 25th of this year.

IMMIGRATION JUDGE: Off the record. On the record. There is now presented a birth certificate for James Richard Montes, born January 25, 1973. Certificate returned. Now, Counsel, what is your problem?

MR. MARTINEZ: I claim that economic detriment will be done to the United States citizen child if his parents are forced to leave the United States.

IMMIGRATION JUDGE: So in other words, they don't want to leave.....

MR. GELMAN (of Counsel): They want to leave, but.....

IMMIGRATION JUDGE: ,,,but they are not ready to promptly depart so they are not ready for voluntary departure, is that what you're telling me?

MR. GELMAN: I'm not telling you that, I'm telling you that it would take some time for them to....

IMMIGRATION JUDGE: And for how much time do you ask?

MR. MARTINEZ: I ask for six months.

MR. MARCANTONI: Government would not object to 90 days voluntary departure.

IMMIGRATION JUDGE: That would seem more than enough time for voluntary departure. I will accede to the government's request that they be given an extended period of voluntary departure, of three months.

IMMIGRATION JUDGE: Mr. Gelman, are you then, prepared to take that as a final order?

MR. GELMAN: I am not prepared to take any final order.

IMMIGRATION JUDGE TO BOTH RESPONDENTS:

Q If I give you a period of one month within which to leave the United States, rather than be deported, would you leave within that time?

A ----

Q If I gave you a period of one month within which to leave the United States voluntarily, without being deported, will you leave within that time?

A Yes.

IMMIGRATION JUDGE: All right, this is the decision.

NOTE: At this point in the proceedings, the Immigration Judge delivered an oral statement of his decision in this matter. This has been transcribed separately and is attached hereto.

IMMIGRATION JUDGE: Do you waive appeal?

MR. GELMAN: I would like to add something, your honor, if I may?

MR. IMMIGRANT JUDGE: Do you want to waive appeal?

MR. GELMAN: No, and I would like to add something if I may.

IMMIGRATION JUDGE: I will serve you with the notice of appeal.

There is nothing to be added. What's to be added?

MR. GELMAN: I would like to state that it's the policy in cases like this, that's not very fair in that you grant.....

IMMIGRATION JUDGE: Off the record.

IMMIGRATION JUDGE: Yes, I am conjecturing in order to save any peradventure of a doubt, if you advise me while I have jurisdiction that you waive appeal, I will accede to the government's suggestion of ninety days. Otherwise, the decision stands. And there's no conjecture left.

DECISION AND ORDER OF THE IMMIGRATION JUDGE,
DATED APRIL 12, 1973.

Respondents, husband and wife, aliens, natives and citizens of Ecuador entered the United States as visitors for pleasure. The husband on February 1, 1969 authorized to remain until August 1, 1969. The wife entered the United States at New York also, but on January 26, 1972 and was authorized to remain until February 10, 1972. Each of the respondents remained beyond the authorized time without permission and are subject to deportation as charged in their respective Orders to Show Cause as has been conceded.

Respondents have applied for the privilege of voluntary departure. They testified that they have never been arrested, nor belonged to any subversive organizations. They have testified that if given the period of one month within which to leave voluntarily, they would do so. The government offered an extended period of voluntary departure due to the fact that they are the parents of a United States citizen child born during their illegal stay in the United States. However, I note, Counsel has stated he is not prepared to take a final order and the record shows that the husband entered the United States in 1969 and that about three years later, while he was here unlawfully, he was joined by his wife. They testified they were married November 29, 1963. It is plain that both respondents wilfully violated the immigration law and obviously, quite consciously. Under the circumstances an extended period of time for voluntary departure is not warranted and as a matter of discretion therefore, particularly since they are not prepared to

leave the United States within the more than generous offer of time from the Trial Attorney. Instead, Counsel proposes to engage in dilatory measures. He proposes to take an appeal and the only purpose such an action would serve would be to further prolong respondent's illegal stay. To extend the period to ninety days at this time would merely add ninety days beyond the Board's final decision, a wholly unwarranted result.

ORDER: IT IS ORDERED that in lieu of an order of deportation, respondents be granted voluntary departure, without expense to the government, on or before May 12th, 1973, or any extension beyond such date which may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondents fail to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondents shall be deported from the United States to Ecuador on the charge contained in the Order to Show Cause. (signed) Francis J. Lyons,
IMMIGRATION JUDGE.

DECISION AND ORDER OF THE BOARD OF IMMIGRATION
APPEALS, DATED AUGUST 15, 1973.

This is an appeal from an order of an immigration judge granting the respondents voluntary departure in lieu of deportation on or before May 12, 1973, or any extension beyond such date which may be granted by the District Director and under such conditions as the District Director may direct. The immigration judge further ordered that if the respondents fail to depart when and as required, the privilege of voluntary departure will be withdrawn and the respondents will be deported to Ecuador. The appeal will be dismissed.

The respondents are husband and wife, natives and citizens of Ecuador. The husband entered the United States in 1969 as a non-immigrant visitor for pleasure and was joined by his wife three years later. She also was admitted as a nonimmigrant visitor. They both overstayed the authorized time to remain in the United States and are subject to deportation. Now, because a child was born to them during their stay in the United States, the respondents are asking for extended voluntary departure.

Counsel on appeal argues (1) that serious economic detriment will accrue to the United States citizen child if the parents are forced to depart at this time; (2) that compelling humanitarian factors exist for the granting of extended voluntary departure.

The principal ground for appeal is that the immigration judge abused his discretion in not granting the respondents a longer period of departure time. The regulations defining this Board's jurisdiction specially carve out an exception under circumstances such as these, where the immigration judge has granted voluntary departure within a period of time, at least 30 days. See 8 C.F.R. 3.1(b)(2). It is contemplated that after the initial grant of voluntary departure time, a request for an extension shall be within the exclusive jurisdiction of the District Director. See 8 C.F.R. 244.2. In any case, we find after a careful review of the record and the respondents' representations on appeal, that there was no abuse of discretion on the part of the immigration judge in granting the respondents 30 days to depart voluntarily from the United States. On this set of facts an extended voluntary departure was not merited. Moreover, by taking this appeal the respondents obtained the benefit of the automatic stay accorded by 8 C.F.R. 3.6, and have gained an additional period of more than three months. We see no reason to disturb the immigration judge's order.

We reject counsel's arguments on appeal. Understandably economic detriment will result to the United States citizen child if his parents are deported. Nevertheless, it is one of the incidents of a situation brought about by the contrivance of the respondents themselves, and is not due to any act or conduct of the Government.

See Application of Amoury, 307 F. Supp. 213 (U.S.D.C., S.D.N.Y., 1969); Perdido v. INS, 420 F. 2d 1179 (5 Cir. 1969); Aalund v. Marshall, 323 F. Supp. 1380 (C.C.E.D. Texas 1971), aff'd 469 F.2d 1405 (5 Cir. 1973); Dayao v. Staley, 303 F. Supp. 16 (U.S.D.C., S.D. Texas 1969).

We reject counsel's other argument that compelling humanitarian factors exist for granting extended voluntary departure. As we indicated above, if additional time for departure was indicated, an appropriate request should have been made to the District Director, 8 C.F.R. 244.2. Moreover, it is an incontrovertible fact that thousands of infants are being transported daily by air throughout the world without any deleterious effect on their health. Besides, we do not consider the grant of 30 days in the circumstances a hasty departure as alleged by counsel. Accordingly, the following order will be entered.

ORDER: The respondents' appeal is dismissed.

FURTHER ORDER: The respondents are permitted to depart from the United States within 30 days from the date of this decision or such extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondents shall be deported as provided in the immigration judge's order.

WARRANT OF DEPORTATION DATED NOVEMBER 26, 1973

Gustavo Adolfo MONTES-ROMO
323 50th Street, 2nd Floor
Brooklyn, New York

A20 093 987 DB/IN
November 26, 1973

Dear

This is a warning. Please read carefully.

It has been ordered that you be deported to ECUADOR.

You will be informed when departure arrangements are complete. If needful, we will assist you as much as possible in arranging your personal affairs for departure.

Should you wish to return to the United States you must write this office or the American Consular Office nearest your residence abroad as to how to obtain permission to return after deportation. By law (Title 8 of United States Code, Section 1326) any deported person who returns without permission is guilty of a felony. If convicted he may be punished by imprisonment of not more than two years and/or a fine of not more than \$1,000.00.

Please keep this letter and refer to the above file number when writing to this office.

Very truly yours, (signed) Harold J. Grace, Assistant District Director for Deportation.

SURRENDER NOTICE DATED JANUARY 2, 1974

GUSTAVO ADOLFO MONTES-ROMO
323 50th Street, 2nd Floor
Brooklyn, New York

File A20 093 987 TU-RD
Date: January 2, 1974

YOUR USC CHILD MAY ACCOMPANY
YOU IF YOU DESIRE. PLEASE
BRING USC PASSPORT.

As you know, following a hearing in your case you were found deportable and the hearing officer has entered an order of deportation. A review of your file indicates there is no administrative relief which may be extended to you, and it is now incumbent upon this Service to enforce your departure from the United States.

Arrangements have been made for your departure to ECUADOR

From NEW YORK, N.Y. on the TRANSPORTATION WHICH HAS BEEN ARRANGED
(name of vessel, airline, or other trans.)

You should report to a United States Immigration Officer at Room 15th Fl.

20 West Broadway, N.Y.C. at 9 AM JANUARY 9, 1974
(address) (hour and date)

completely ready for deportation. At the time of your departure from
NEW YORK, N.Y. you will be limited to 44 pounds of baggage.
(place of surrender)

Should you have personal effects in excess of this amount you must immediately contact TRANSPORTATION OFFICER at 212 264-5979, or call in person at the address noted above, and appropriate disposition of your excess baggage will be discussed with you.

Very truly yours, HAROLD J. GRACE, ASSISTANT DISTRICT DIRECTOR FOR
DEPORTATION.

WARRANT OF DEPORTATION DATED NOVEMBER 26, 1973

Dora Ochoa-Hunt de Montes
323 50th Street, 2nd Floor,
Brooklyn, New York

A20 093 988 DB/IN
November 26, 1973

Dear

This is a warning. Please read carefully.

It has been ordered that you be deported to ECUADOR.

You will be informed when departure arrangements are complete. If needful, we will assist you as much as possible in arranging your personal affairs for departure.

Should you wish to return to the United States you must write this office or the American Consular Office nearest your residence abroad as to how to obtain permission to return after deportation. By law (Title 8 of United States Code, Section 1326) any deported person who returns without permission is guilty of a felony. If convicted he may be punished by imprisonment of not more than two years and/or a fine of not more than \$1,000.00.

Please keep this letter and refer to the above file number when writing to this office.

Very truly yours, (signed) HAROLD. J. GRACE, ASSISTANT DISTRICT
DIRECTOR FOR DEPORTATION.

SURRENDER NOTICE DATED JANUARY 2, 1974

DORA OCHOA-HUNT DE MONTES
323 50th Street 2nd Fl.
Brooklyn, New York

FILE: A20 093 988 TU-RD
Date: January 2, 1974

As you know, following a hearing in your case you were found deportable and the hearing officer has entered an order of deportation. A review of your file indicates there is no administrative relief which may be extended to you, and it is now incumbent upon this Service to enforce your departure from the United States.

Arrangements have been made for your departure to ECUADOR
(country)

on _____ from NEW YORK, N.Y. on the
(date) (port of departure)

TRANSPORTATION WHICH HAS BEEN ARRANGED
(name of vessel, airline, or other transportation)

You should report to a United States Immigration Officer at
Room 15th Floor 20 West Broadway, N.Y.C. at 9AM January 9, 1974
No. (address) (hour and date)

completely ready for deportation. At the time of your departure from

NEW YORK, N.Y. you will be limited to 44 pounds of
(place of surrender)

baggage.

Should you have personal effects in excess of this amount you must
immediately contact Transportation Officer at 212 264-5978 264-5976 or
212 264-5979 212
(name of officer)

call in person at the address noted above, and appropriate disposition of your excess baggage will be discussed with you.

Very truly yours, HAROLD J. GRACE, ASSISTANT DISTRICT DIRECTOR FOR
DEPORTATION

PETITION FOR REVIEW TO THIS COURT

Petitioners, Gustavo Adolfo Montes-Romo, and Dora Ochoa Hunt de Montes, husband and wife by their attorney, Antonio C. Martinez respectfully petitions the Court to review the Order of the Board of Immigration Appeals dated August 15, 1973, Exhibit 1.

The validity of such Order has not been upheld in any prior judicial proceeding to which petitioner is a party.

Petitioners' alien registration numbers are A20 093 987 and A20 093 988.

Dated: New York, N.Y.
January 8, 1974

(5)
COPY RECEIVED
Paul J. Curran
UNITED STATES ATTORNEY
12/20/74 3